Supreme Court, U.S.
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No. 02-1506

IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO., LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Winter Storm Shipping, Ltd. is a privately held corporation and has no parent company.

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COUNTER-STATEMENT OF THE CASE

This case involves a dispute between Respondent and Petitioner under a maritime charter party contract. On or about February 26, 2001, Respondent chartered the M/V NINEMIA to Petitioner. During the charter party, Petitioner wrongfully withheld freight due and owing to Respondent. Under the terms of the charter, the dispute between the parties is subject to arbitration in London, England. Both parties have appointed arbitrators and the arbitration is proceeding.

Respondent filed a Verified Complaint in the district court on June 21, 2001. On June 22, 2001, the district court issued an Order for ex parte attachment of Petitioner's property within the district. On June 27, 2001, Respondent filed an Amended Verified Complaint. The same day, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Adm., Supp. B (hereinafter "Supplemental Admiralty Rule B" or "Rule B"), the Clerk issued a supplemental writ of maritime attachment and garnishment authorizing attachment of Petitioner's property within the district, including any property held by Bank of New York (hereinafter "BNY") as garnishee, up to the amount of $361,621.58.

Respondent served the writ on several New York banks, including the BNY from June 27 through June 29, 2001. On July 2, 2001 at 6:48 a.m., BNY received by way of the Swift electronic funds transfer system a payment order for an international electronic funds transfer (hereinafter "EFT") from Petitioner's bank, Bank of Ayudhya, in Thailand. Petitioner was the originator of the funds transfer. The payment order instructed BNY to debit the sum

of $1,085,071.41 from Bank of Ayudhya's correspondent account at BNY and to remit that sum to the receiver's bank, Royal Bank of Scotland in London, for ultimate payment to Oppsal Shipping Co. Ltd. In response to Respondent's prior service of the writ of attachment, BNY debited Bank of Ayudhya's correspondent account and placed $361,621.58 of the funds into a suspense account in order to comply with the district court's June 22, 2001 Order. Later, at 10:58 a.m. on July 2, 2001, Respondent again served the writ of attachment on BNY. At that moment, Respondent perfected maritime attachment of the Petitioner's property as security for its claim pending in the London arbitration, and the district court thereby obtained jurisdiction over Petitioner.

Petitioner moved in the district court for an order vacating the attachment and dismissing the Amended Verified Complaint, arguing, *inter alia*, that the funds held by BNY were not its "property," as that term is interpreted under federal law set forth in Supplemental Admiralty Rule B. In its January 11, 2002 Opinion and Order, the district court agreed with that argument. The district court also held that, even if Respondent had attached Petitioner's "property" under Rule B, New York Uniform Commercial Code Article 4A § 503, N.Y. C.L.S. U.C.C. § 4-A-503 (McKinney 2001) (hereinafter "NY UCC 4A-503") expressly prohibited an attachment at the intermediary bank stage of an EFT. The district court reasoned that because there was no governing federal rule, application of NY UCC 4A-503 was appropriate. Subsequently, on January 28, 2002, the district court granted Winter Storm's motion for stay of execution of the January 17, 2002 judgment pending appeal.

On appeal, the United States Court of Appeals for the Second Circuit vacated the district court's judgment on the basis that prior Second Circuit precedent and the broad language of Rule B combine to fashion a rule in the Second Circuit that EFT funds may be attached pursuant to Rule B in the hands of an intermediary bank. The Second Circuit reasoned that because the rule is federal, there is no occasion to look to state law as the district court had done. Alternatively, the Second Circuit concluded that even if resort to state law is appropriate, Rule B preempts NY UCC 4A-503, the precise New York statute the district court relied on in vacating the attachment.

REASONS FOR DENYING THE WRIT

The paramount question which this case presents is whether an EFT constitutes tangible or intangible "property" for purposes of Supplemental Admiralty Rule B. Petitioner urges that the Second Circuit's decision, answering that question in the affirmative, conflicts with holdings of this Court and other circuits purportedly mandating that state law govern the question of what constitutes property when federal law does not define the term in context. The alleged conflict, however, is a product of Petitioner's misreading of the Second Circuit's decision. The Second Circuit took full account of governing cases and the analysis previously employed by courts that have addressed the issue.

No prior holding of this Court or any other federal court creates an absolute requirement that federal courts must look to state law for the definition of property for purposes of Rule B. Such a requirement, moreover, would eviscerate the admiralty preemption doctrine. Instead, precedent suggests that it is only in the absence of an established federal rule

that federal courts should look to state law in order to fashion a federal rule. The Second Circuit held that federal precedent from the Second Circuit itself provided the basis for a federal rule that an EFT, while in the hands of an intermediary bank, constitutes attachable property for purposes of Supplemental Admiralty Rule B. Because there was an established federal rule, there was no need to look to state law. The court reasoned, alternatively, that the key provisions of the state law the district court relied upon in vacating the attachment, *i.e.*, NY UCC Article 4A, would be preempted by Rule B in any event.

Finally, the Second Circuit's decision dealt with an issue unique to the New York banking system as the international clearing center for United States dollar transactions. As a result, the decision does not affect, and most certainly does not conflict with, the law in any other circuit.

I.

THE DECISION DOES NOT INVOLVE IMPORTANT FEDERAL-STATE "INTERPLAY" CONCERNS

Citing to *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), Petitioner contends that this case presents "novel questions as to the interplay of state and maritime law." Pet. at 6. This attempt to qualify the case as deserving of a writ of certiorari is flawed because it ignores entirely the fact that maritime attachments are governed by federal law and the Second Circuit's decision is entirely based on a federal rule.

Petitioner explains that the case below dealt with the "interplay" between Supplemental Admiralty Rule B and Article 4A of the Uniform Commercial Code under state law. The real question presented below, however, was whether, as a matter of federal law, a maritime attachment of an EFT in the hands of an intermediary bank constitutes tangible or intangible property for purposes of Supplemental Admiralty Rule B.

The Second Circuit has explained why state law has no application in this context:

> [s]tate law is irrelevant to the validity of process under Supplemental Rule B(1). . . . The purpose of the Supplemental Rule was to preserve the ancient process of maritime attachment that had been known to courts of admiralty for centuries. . . . The remedy, under the terms of Rule B(1), is completely independent of state law and of any state attachment or garnishment procedures, which may be employed by a libellant either instead of, or in addition to the process issued under the Rule.

Maryland Tuna Corp. v. The M/S Benares, 429 F.2d 307, 321 (2d Cir. 1970). *See also Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) (federal law governs questions as to the validity of Rule B attachments).

Petitioner fails to challenge that part of the Second Circuit's decision holding that Rule B preempts NY UCC 4A-503, the specific New York state statute Petitioner relied on in its motion to vacate the attachment at the district court.

Accordingly, Petitioner has waived any argument concerning the Second Circuit's preemption analysis. Petitioner's argument regarding application of state law in a maritime attachment case crumbles because it fails to point to any error in the Second Circuit's preemption analysis. Application of any state law in a case governed by federal law must overcome preemption concerns. Petitioner has ignored the issue entirely.

Petitioner criticizes the Second Circuit for failing to apply state law, without any regard for the clearly identifiable preemption issue. The rule Petitioner advances would, if accepted, allow NY UCC § 4-A-503 to undermine the fundamental purposes of the ancient remedy of Rule B admiralty attachments. Courts have concluded that the remedy of maritime attachment is, by any measure, a characteristic feature of the general maritime law, *see Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996), and, as an action against property, a "keystone of admiralty jurisprudence." *Grand Bahama Pet. Co., Ltd. v. Canadian Transp. Agencies, Ltd*, 450 F. Supp. 447, 452-53 (N.D. Wash. 1978). Having waived any objection to the Second Circuit's preemption analysis, Petitioner must concede that NY UCC § 4-A-503 is preempted by virtue of its impermissible material prejudice to Rule B. In any event, the Second Circuit's preemption analysis is unassailable and controlling as to the federal-state interplay issue Petitioner raises.

II.

THE DECISION DOES NOT CONFLICT WITH ANY PRECEDENT

Petitioner's contention that the Second Circuit's holding on the "property" issue conflicts with precedent is founded upon a misconception of the issue. Petitioner theorizes that prior decisions of this Court and other circuit courts create an absolute requirement that state law define property interests when federal statutes touching on the issue fail to do so.

To the contrary, there is no absolute requirement. Rather, starting with the accepted premise that "[f]ederal law generally governs questions as to the validity of Rule B attachments," the Second Circuit followed its own precedent in analyzing the "property" issue. *Winter Storm*, 310 F.3d at 275 (Pet. Appx. A at 24a) (*quoting Reibor*, 759 F.2d at 266 (recognizing that although courts sitting in admiralty are obligated to apply federal law, they may look to state law where federal precedent is lacking or sparse)). *See also Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307, 321 (2d Cir. 1970) (maritime attachment "under the terms of Rule B(1), is completely independent of state law" and "state law is irrelevant to the validity of process under Supplemental Rule B(1)").

In conducting its analysis of the property issue, the Second Circuit properly sought to determine as a first step "whether governing federal law provides the answer in general terms or otherwise; or whether federal law is silent on the particular question presented. . . ." *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263, 275-76 (Pet. Appx. A at

25a). The court's analysis, therefore, was proper and in keeping with the principle that federal law generally governs the validity of Rule B attachments. Nevertheless, Petitioner argues that the Second Circuit erred by not looking to state law, irrespective of governing federal law addressing the issue, such as Rule B itself.

Petitioner also contends that the Second Circuit's consideration of *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) was inappropriate because that case did not arise under admiralty jurisdiction. That contention is erroneous. *Daccarett* is a civil forfeiture case decided under federal drug laws. The court held in *Daccarett* that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res." *Daccarett*, 6 F.3d at 55. The EFT seizure was pursuant to the Supplemental Admiralty Rules. The case is clearly relevant here. In Petitioner's view, despite *Daccarett's* obvious relevance the Second Circuit should have ignored it on the basis that application of state law is mandatory, simply because the case was not decided under the court's admiralty jurisdiction. Petitioner has confused the source of the court's authority with the issue of whether there is a genuine federal rule; the two subjects have nothing to do with each other.

Second, cases analyzing the validity of Rule B maritime attachments pursuant to federal law, including those on which Petitioner relies, do not create a requirement that the controlling federal rule may arise only from cases decided under admiralty jurisdiction or that a federal court sitting in admiralty is bound to look to state law to determine what constitutes attachable property.

Instead, the relevant precedents hold that only in the absence of an established federal rule should federal courts look to state law in order to fashion a federal rule. In analyzing this issue, the Second Circuit held that prior federal precedent from the Second Circuit itself provided the basis for a federal rule that an EFT while in the hands of an intermediary bank constitutes attachable property for Supplemental Admiralty Rule B purposes. Thus, because federal law was not lacking or silent on the issue, the Second Circuit's decision to follow federal law on point was proper.

The cases Petitioner cites are not to the contrary. *See, e.g., Union Planters National Bank v. World Energy Systems, Assoc.*, 816 F.2d 1092 (6th Cir. 1987) (simply reciting the holding of *Reibor*, 759 F.2d 262); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420 (S.D.N.Y. 1987) (also citing *Reibor, supra*, and referring to state law only in the complete absence of a federal rule); *International Marine Consultants, Inc. v. Karavias*, 1985 U.S. Dist. LEXIS 19272 (S.D.N.Y. 1985) (holding only that to sustain maritime attachment, property must belong to defendant and plaintiff has burden of proving ownership; attachment was not vacated under New York corporate law); *Diakan Love, S.A. v. Al-Haddad Bros. Enterprises, Inc.*, 584 F. Supp. 782 (S.D.N.Y. 1984) (complete absence of any federal rule); *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999) (neither Rule B nor admiralty jurisdiction involved and no argument made that established federal rule existed on the issue in dispute).

The Second Circuit's decision was founded upon proper analysis of the key issue and the holding does not conflict with any decision of this Court or any other court. Rather, the holding is in harmony with other Second Circuit cases and is founded upon a logical interpretation and application of the Supplemental Admiralty Rules.

III.

THE DECISION DOES NOT AFFECT UNIFORMITY OF MARITIME LAW OR CREATE A HARDSHIP TO THE BANKING SYSTEM

A. The Decision does not affect uniformity of maritime law

Perpetuating the district court's flawed analysis, Petitioner contends that Second Circuit's decision disrupts uniformity of maritime law. Without identifying the issue specifically, Petitioner turns federal preemption analysis on its head by urging a misapplication of maritime law's uniformity principle, which derives from admiralty preemption cases.

The uniformity issue typically arises, as it did in *Aurora Maritime v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44 (2d Cir. 1996), when application of various state laws would lead to divergent results in cases decided under federal admiralty jurisdiction. What Petitioner actually is urging is uniformity of Uniform Commercial Code Article 4A as part of state law. Yet, application of state law in an admiralty case, even if it were to have the effect of promoting uniformity of the maritime law, must not work a material prejudice to a characteristic feature of the maritime law. As the Second Circuit reasoned, application of NY UCC 4-A-503 demonstrably prejudices Rule B, mandating preemption. *Winter Storm*, 310 F.3d at 279 (Pet. Appx. A at 33a-34a).

Petitioner's exhortations regarding the nationwide enactment of UCC Article 4A at the state level and its adoption under Federal Reserve System Regulation J[1] for

1. Federal Reserve System Regulation J, 12 C.F.R. Part 210 *et seq.*

the Fedwire transfer system are equally wide of the mark. The nationwide enactment of Article 4A and the likelihood that it would preclude attachment of an EFT pursuant to state law ignores the special role maritime law and Rule B play under federal law. That an attempted attachment in a federal proceeding pursuant to state attachment law under Federal Rule of Civil Procedure 64 might also be precluded by Article 4A is irrelevant for the same reason.

> Since 1844 Admiralty Rules of Procedure have had but one author: the United States Supreme Court. Their lineage sets them apart from common law based sequestration, garnishment, and attachment laws developed by the legislature of the several states. As offspring of the very institution charged with mandating the procedural safeguards required before property may be taken, Supplemental Rules for Admiralty must be reviewed with special deference.

Schiffahrtsgesellschaft Leonhardt v. A. Bottacchi S.A. De Navegacion, 732 F.2d 1543, 1548, 1549 (11th Cir. 1984) (citations omitted). The special deference afforded to the Supplemental Admiralty Rules renders invalid Petitioner's arguments regarding the potential disparate treatment of state attachment law. In sum, Petitioner fails to recognize that historically there has always been a "wedge" between state and maritime attachments. The banking system has, therefore, always had the task of distinguishing between attachment process issued pursuant to Supplemental Admiralty Rule B versus state attachment law. Contrary to Petitioner's suggestion, the Second Circuit's decision creates no new or different obligation on the banking system.

In furtherance of its effort to create the appearance of a conflict created by the Second Circuit's decision, Petitioner contends that the decision means that different rules will apply to Rule B attachments of EFTs at the intermediary bank stage depending on the funds transfer system at issue. Petitioner's argument is premised on Federal Reserve System Regulation J, 12 C.F.R. Part 210 *et seq.*, Regulation J makes UCC Article 4A applicable to EFTs under the Fedwire transfer system. More importantly, "Fedwire does not transfer funds outside of the United States." *Organizacion JD Ltda. v. U.S. Dept. of* Justice, 1996 U.S. Dist. LEXIS 4347, *5 (E.D.N.Y. 1996). Because Fedwire is purely a federally owned[2] domestic transfer system and is not involved in international EFTs, such as the EFT in this case which was pursuant to Swift, a private transfer system, Petitioner's fears over the impact of the Second Circuit's decision on Fedwire transfers are misplaced.

As Petitioner explains in its Petition, Swift is but one of three major transfer systems, the other two being Chips and Fedwire. In adopting Article 4A, however, the Federal Reserve Board declared that the adoption was necessary only "to ensure that the law applicable to *funds transfers involving Federal Reserve Banks is uniform for all Fedwire funds transfers*. . . ." Federal Reserve System Regulation J, Official Comment, 55 Fed. Reg. 40791 (1990) (emphasis added). While it is a fact that 52 jurisdictions have adopted Article 4A as state law, it is also a fact that "Article 4A was approved in 1989 by ALI and the National Conference of Commissioners on Uniform State Laws for adoption by the various states *against a view preferring the federal adoption*

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2. The Fedwire funds transfer system is "owned and operated by the Federal Reserve Bank. . . ." 12 C.F.R. § 210.26(e).

of a funds transfer statute." THE LAW OF ELECTRONIC FUND TRANSFERS, Vol. 1-1 § 1.05 (emphasis added). Moreover, Petitioner's uniformity argument premised on Regulation J is diluted by the fact that Regulation J itself makes clear that even UCC Article 4A as adopted under the Regulation may be preempted.[3] Logically, Regulation J might also preempt Article 4A enacted under state law to the extent the two conflict.

Petitioner places undue emphasis on Regulation J and its adoption of Article 4A to govern Fedwire transfers. As the district court correctly stated, "[b]y its terms . . . Regulation J does not control the transaction at issue in this case, a SWIFTWIRE international transfer. . . ." *Winter Storm Shipping Ltd. v. TPI*, 198 F. Supp. 2d 385, 389 n.4 (S.D.N.Y. 2002) (Pet. Appx. B at 45a). Application of UCC Article 4A at the federal level is clearly limited to Fedwire transfers alone. In any event, the conflict Petitioner perceives between Rule B and Regulation J is not an issue in this appeal and is no remedy for its ill-conceived uniformity argument.

B. The Decision does not create a hardship on the banking system

Petitioner also advances policy arguments which it claims merit the issuance of a writ of certiorari. Petitioner overestimates the impact of the Second Circuit's decision by asserting that it will open the floodgates to additional maritime attachment actions under Rule B, which in turn will

3. Regulation J states: "This subpart incorporates the provisions of Article 4A set forth in appendix B to this subpart. In the event of an inconsistency between the provisions of the sections of this subpart and appendix B, to this subpart, the provisions of the sections of this subpart shall prevail." 12 C.F.R. § 210.25(b)(1).

supposedly overburden the banking system. Petitioner is wrong on both points and ignores the reality that the issue the Second Circuit addressed is unique to the New York banking community.

Prior to the enactment of Article 4A of the Uniform Commercial Code in 1990, when there was not state legislation in the area, there was no flood of EFT attachments pursuant to Rule B. It is therefore inconceivable that the Second Circuit's decision will lead to a burgeoning of maritime attachments. This is especially true when any maritime attachment of an EFT must still meet the timing requirement established in *Reibor*, 759 F.2d 262 (2d Cir. 1985) (attachment is void unless garnishee possesses defendant's property at the time process is served on garnishee).

Regarding the hardship to the banking system that Petitioner alleges the decision will produce, the Second Circuit has recognized in other cases that foreign parties often make payment in U.S. dollars by clearing EFTs through New York, because New York is "the international clearing center for United States dollars." *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 13 (2d Cir. 1989) (Kaufman, J. dissenting) (quoting *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985), *cert. dismissed*, 473 U.S. 934, 87 L. Ed. 2d 706, 106 S. Ct. 30 (1985)). Thus, the Second Circuit's decision addresses an issue that is in practical terms limited to the Second Circuit and, more precisely, the New York banking system.

Moreover, Petitioner ignores entirely the fact that the entire United States banking system already copes on a daily basis with far greater burdens imposed by drug forfeiture

statutes and foreign asset control regulations administered by the Office of Foreign Asset Control of the United States Department of the Treasury. *See* 31 C.F.R. Part 500 *et seq.* To ensure compliance with these regulations, banks routinely utilize "interdiction software" to screen EFT transactions. *See* Kluber, *Global Distributions: The Effect of Export Controls*, 23 HOUS. J. INT'L L. 429, 452 nn. 147-48 (2001).

The Second Circuit's decision imposes on the banking system no greater or different burdens beyond those with which it already copes quite well. Logically, any disruption of electronic funds transfer systems created by maritime attachment of EFTs would be identical in all respects to those created by seizures of EFTs under federal criminal and civil laws, or those created by EFT interdictions pursuant to OFAC regulations. Yet, neither the Federal Reserve Bank of New York, nor the New York Clearing House Association, LLC, both of which made *amicus curiae* submissions to the Second Circuit, have complained about the latter burdens.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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